NO. 84-1680

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DUNBAR STONE COMPANY, INC., RONALD DUNBAR and GERALD DUNBAR,

Petitioners,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF INTERIOR, SECRETARY OF INTERIOR, DEPARTMENT OF AGRICULTURE, FOREST SERVICE and DISTRICT RANGER JOHN W. HOLT, BRADSHAW MOUNTAIN DISTRICT,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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78 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit erred when it affirmed the decision of United States District Court for the District of Arizona affirming the decisions of the Interior Board of Land Appeals and Administrative Law Judge of the United States Department of the Interior holding:

1. That a deposit of schist located and mined by Petitioners does not qualify as an uncommon variety of building stone that would entitle Petitioners to hold mining claims covering the deposit under the general mining law of the United States;

2. That a deposit must have a "unique" property rather than merely "some" property giving the deposit special and distinct value in order to be an uncommon variety and thus locatable;

3. That for purposes of determining special and distinct value the United States need not make a showing that the deposits used for comparison are in fact common varieties; and

4. That scientific and economic information found in publications of the United States government and in standard reference works are not susceptible of judicial notice by the United States Court of Appeals.

TABLE OF CONTENTS

	PAGE
Writ of Certiorari	i
Questions Prevented for Review	ii
Table of Contents	iv
Table of Authorities	vi
Reference to the Official and Unofficial Report	1
Statement of Jurisdiction	3
Statutory Provisions	4
Statement of the Case	6
Reasons for Granting the Writ	12
I. A Deposit Of Building Stone Need Only Have "Some Property" Giving The Deposit Distinct And Special Value In Order To Be Locatable.	13
II. The Decision Below Failed To Demonstrate That The Dunbar Stone Is A Common Variety By Comparison With Other Common Varieties As Required By Decisions Of The IBLA.	19
III. The Ninth Circuit Improperly Rejected Consideration Of Technical And Economic Data Presented By Petitioner For Which Judicial Notice May Be Taken By The Appeals Court.	23

		PAGE
Conclusion		29
Certificate of Service		30
Appendix		
A.	Opinion to be Reviewed -- United States Court of Appeals for the Ninth Circuit Memorandum Decision	1a
B.	Judgment to be Reviewed -- United States District Court for the District of Arizona	12a
C.	Decision of the Interior Board of Land Appeals of the United States Department of the Interior	14a
D.	Decision of the Office of Hearings and Appeals of the United States Department of the Interior	26a

TABLE OF AUTHORITIES

CASES	PAGE
ASARCO, Inc. v. EPA, 616 F.2d 1153 (9th Cir. 1980)	23, 25
ASG Industries, Inc. v. United States, CD 4782, 467 F. Supp. 1187, (Cust. Ct. 1979), reversed on other grounds, 610 F.2d 770	26
Azoplate Corp. v. Silverlith, Inc., 367 F. Supp. 711, affirmed, 506 F.2d 506 F.2d 1050 (D. Del 1874), cert. denied, 421 U.S. 914 (1975)	28
Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979)	26
Dunbar Stone Co. v. United States, C.A. No. 84-1915 (1985)	14
Humboldt Placer Mining Company v. Secretary of Interior, 549 F.2d 622 (9th Cir. 1977)	20
McClarty v. Secretary of Interior, 408 F.2d 907, 908 (9th Cir. 1969)	14, 15, 16
Minerals Development Corporation, 75 I.D. 127 (1968)	14, 16
Owens-Illinois Glass Company v. American Coastal Lines, Inc., 222 F. Supp. 923 (S.D.N.Y. 1963)	27
Rodgers v. Watt, 726 F.2d 1376, 1380 (9th Cir. 1984)	20

CASES	PAGE
United States v. Coleman, 390 U.S. 599 reh. den. 391 U.S. 961 (1968)	14
United States v. Dunbar, Stone Company, 56 IBLA 61 (1981)	6, 10, 18
United States v. Gonzales, 442 F.2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 845	26
United States v. Mamie Vaughn, et al., 56 IBLA 247 (1981)	21
United States v. Zweifel, 508 F.2d 1150, 1157 cert. denied, 423 U.S. 829 (1975)	20
Authorities	
28 U.S.C. § 1254	3
30 U.S.C. § 22	4, 12, 13,
30 U.S.C. § 161	4, 12, 13, 15, 16, 23
30 U.S.C. § 611	5, 8, 12, 13, 15, 16, 19, 25
Federal Rules of Evidence Rule 201(a), (f)	25
United States Bureau of Mines Mineral Yearbook, vol. II, p. 70 (1981)	9

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORT

The United States Court of Appeals for the Ninth Circuit rendered a memorandum opinion (C.A. 84-1915, Memorandum), a copy of which is attached as Appendix A hereto (pages 1a to 11a). The opinion will not be reported in the Federal Reporter. The United States District Court for the District of Arizona granted summary judgment to the United States without opinion, which judgment is attached as Appendix B hereto (pages 12a to 13a). The Interior Board of Land Appeals of the United States Department of Interior rendered an opinion which is published at 56 IBLA 61 (July 10, 1981), which is attached as Appendix C hereto (pages 14a to 25a). The decision of the Office of Hearings and Appeals of the United States Department of Interior (Arizona

10637, June 24, 1980) is not reported, a copy of which is attached as Appendix D hereto (pages 26a to 38a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 24, 1985. This Petition for Certiorari was filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254, that provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTORY PROVISIONS

The statutes of the United States involved in this case are as follows:

> 30 U.S.C. § 22. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.
>
> 30 U.S.C. § 161. Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed

to repeal Section 471 of Title 16 relating to the establishment of national forests.

30 U.S.C. § 611. No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603 and 611 to 615 of this title does not include deposit of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in Sections 601, 603 and 611 to 615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

STATEMENT OF THE CASE

This action arose in 1978 when the Bureau of Land Management ("BLM") filed an administrative contest action seeking to have each of Dunbar's 26 unpatented mining claims located for schist declared invalid. After an administrative hearing, a decision was rendered by Administrative Judge Morehouse on June 24, 1980, declaring each of the claims to be invalid. An appeal was taken from Judge Morehouse's decision to the Interior Board of Land Appeals ("IBLA"). Thereafter, on July 10, 1981, the IBLA affirmed the decision of Judge Morehouse in United States v. Dunbar Stone Company, 56 IBLA 61 (1981). It is this decision of the IBLA that was challenged by Dunbar in the District Court and Court of Appeals below.

The IBLA decision invalidated 26 unpatented mining claims of which 13 were lode

mining claims and 13 were placer mining claims. Dunbar does not challenge the decision of the District Court as to the invalidity of the lode mining claims. Dunbar does, however, believe that the affirmation by the Ninth Circuit of the District Court's decision with respect to the 13 placer claims was erroneous in that the schist found thereon is not a common variety and therefore is locatable under the mining law of the United States.

During 1976, 13 placer mining claims were located on unappropriated lands of the public domain by the predecessors in interest to Dunbar for purposes of mining certain schist found thereon as building stone. These placer mining claims were denominated the New Strike Nos. 1 through 7 and the Evergreen Nos. 1 though 6 (hereinafter collectively the "Placer Claims"). The Placer Claims are located in Sections 17, 18, 19 and 20, Township 13 North,

Range 1 West, G&SR&M, Yavapai County, Arizona, in the Prescott National Forest. Dunbar purchased the Placer Claims subsequent to their location.

Although the surface of Prescott National Forest is administered by the Forest Service, the Bureau of Land Management has jurisdiction over minerals contained within these lands. Deposits of building stone are locatable under the mining law of the United States. 30 U.S.C. § 161. Of minerals found on such lands, common varieties of various minerals, including common varieties of building stone, were withdrawn from location under the mining laws of the United States in 1955. 30 U.S.C. § 611. The United States contends in this case that the Placer Claims are invalid because the schist found on the Placer Claims is a common variety not subject to location pursuant to 30 U.S.C. § 611.

The material mined by Dunbar on the Placer Claims is a variety of schist having various physical and chemical properties making it marketable as a construction material for the building of walls and fireplaces. Dunbar has sold this product to customers in Arizona, California, Montana, New Mexico, Nevada, Washington, Texas, Oklahoma, Oregon and Idaho, as well as British Columbia, Canada. The schist derived from the claims is present in various colors and possess certain physical properties that make it marketable where ordinary schist is not. This combination of special and distinct properties gives the schist a commercial value that enabled Dunbar to sell the material for approximately $55.00 per ton from its yard in Ash Fork, Arizona during 1980. In contrast, other stone provided and used in Arizona for construction and industrial purposes sold for an average of $4.24 per ton in 1981. United

States Bureau of Mines Mineral Yearbook, Vol. II, p. 70 (1981). There are billions of tons of schist in Arizona having no value whatsoever.

Over 4,200 tons of schist were sold from the Dunbar claims for the period from March 1976 through September 1978. Dunbar continues to profitably sell stone from the Placer Claims to this date pending the outcome of this litigation. The United States does not dispute that the Dunbar schist deposit is commercially valuable for building stone; United States v. Dunbar Stone Co., 56 I.B.L.A. 61, 63 (1981) (page 18a). In attempting to prove that the Dunbar schist was a common variety, the United States presented as evidence only one price comparison, that of schist sold by the Apache Stone Company of Phoenix, Arizona, for $56.00 per ton. No evidence was presented or allegation made that the Apache Stone is itself a common variety.

The IBLA found the Dunbar schist to be a common variety and accordingly found the Dunbar Claims to be invalid. Dunbar now disputes the findings of the IBLA, as well as the District Court and Ninth Circuit Court of Appeals below that upheld the Department of Interior's decision.

REASONS FOR GRANTING THE WRIT

The question of the extent of the limitation placed on 30 U.S.C. § 161 by the common varieties exception contained in 30 U.S.C. § 611 has never been addressed by this Court. This question is of great importance to the mining and construction industries since the application of § 611 determines whether deposits of many building and construction materials shall be "free and open to exploration and purchase" as provided by 30 U.S.C. § 22. If such deposits are not locatable then they must be sold under the Materials Act of 1947. Where the lands in question have been withdrawn from mineral entry since location of the claims in question, all mining is prohibited and the rights of the miner are permanently lost. The decision of the Ninth Circuit in this case is in conflict with the decisions of the

Secretary of Interior and incorrectly interprets the statutes of the United States by making compliance with the common variety test of 30 U.S.C. § 611 practically impossible.

I. A Deposit Of Building Stone Need Only Have "Some Property" Giving The Deposit Distinct And Special Value In Order To Be Locatable.

It is clear that Congress intended by the provisions of 30 U.S.C. § 161 that deposits of building stone were to be open to location under the provisions of the general mining law, 30 U.S.C. § 22, et seq. It is equally clear that 30 U.S.C. § 611 places a limitation upon the types of building stone deposits that are subject to mineral location to exclude "common varieties." However, the Ninth Circuit has effectively repealed 30 U.S.C. § 161 by its interpretation that an uncommon variety must have "a unique property" and that "the unique property must give the deposit a

distinct and special value." Dunbar Stone Co. v. United States, C.A. No. 84-1915 (1985), Memorandum at 3 (pages 5a - 6a); McClarty v. Secretary of Interior, 408 F.2d 907, 908 (9th Cir. 1969).

This court has held that 30 U.S.C. § 161 is "entirely effective as to building stone that has 'some property giving it distinct and special value.'" United States v. Coleman, 390 U.S. 599, reh. den. 391 U.S. 961 (1968). Since the decision in Coleman, the Secretary of the Interior has sought "to reconcile his decision with respect to building stone claims against the cogent charge that his rulings avoiding [sic] such claims had the effect of vitiating 30 U.S.C. § 161 with the result that no building stone deposits are locatable under the mining laws." McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). With the McClarty decision the Ninth Circuit sought to apply the Secretary's reasoning in Minerals Development Corporation, 75 I.D. 127

(1968) to the interpretation of 30 U.S.C. §§ 161 and 611 by adopting Secretary's guidelines as follows:

> (1) There must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

McClarty v. Secretary of the Interior, 408 F.2d at 908.

The guidelines adopted by the Ninth Circuit in McClarty are inadequate for two reasons: first, they impose a requirement of uniqueness upon the properties of a deposit which is more stringent than required by the statute and second, the guidelines for comparison with other deposits for purposes of

determining special value are impermissibly vague.

In the decision below, the Ninth Circuit applied guideline (2) from the Mineral Development/McClarty cases in stating that:

> [t]he IBLA found that the Dunbar schist had no "unique property" that would render it an uncommon variety of stone. C.A. No. 84-1915, Memorandum at 4 (page 7a).

Both the Ninth Circuit and IBLA have erroneously required the deposit to have a "unique" property as a condition precedent to determining whether or not such deposit possesses special and distinct value (pages 7a, 22a, 23a and 36a), despite the language of the statute that states the deposit need only possess "some property" having a special and distinct value. 30 U.S.C. § 161.

The IBLA in this case has improperly interpreted 30 U.S.C. § 611 to require "unique" properties, stating:

> As we observed in United States v. Guzman, 18 IBLA 109,

124, 81 I.D. 685, 692 (1974), a case in which we held that the natural sharp angularity of particles of sand did not make a deposit of the sand unique:

> Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare.

So it is here; the angularity of this schist, even if naturally occurring, is inadequate to make it uniquely valuable in an economic sense.

. . .

This schist is readily distinguishable from "cliffstone" and "heatherstone," other types of building stone which we have recognized as unique in, respectively, United States v. Pope, 25 IBLA 199 (1976), and United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974). These stones were unique in that

> they could be removed for sale and use with practically no expense, simply by prying them out of formation with a bar, a distinct and special economic advantage.
>
> . . .
>
> Accordingly, we affirm Judge Morehouse's finding that the schist building stone found on the New Strike Nos. 1 through 7 and Evergreen Nos. 1 through 6 placer mining claims is not unique and is, therefore, a common variety of mineral. As such, it is not locatable under the mining laws, and these claims are therefore null and void.

United States v. Dunbar Stone Company, 56 IBLA 61, 66-67 (1981) (pages 22a - 24a).

Similarly, Judge Morehouse concluded:

> Having carefully considered the entire record, I conclude that contestees have failed to show by a preponderance of the evidence that the building stone on these claims possess a unique property giving it a value for purposes for which other deposits of similar materials are not suited. (page 36a)

The record is replete with descriptions of the properties of the Dunbar schist having "some" properties including cleavage,

hardness, fracturing and coloration that contribute to its value. Thus, the determination below that no unique property exists in the Dunbar schist is a misapplication of § 611 and the finding of invalidity may not be based upon such determination.

II. The Decision Below Failed To Demonstrate That The Dunbar Stone Is A Common Variety By Comparison With Other Common Varieties As Required By Decisions Of The IBLA.

The Ninth Circuit also agreed with the IBLA's finding "that Dunbar schist lacks special economic value." Memorandum at 5 (page 8a). The decisions of the IBLA require that in order to classify a deposit as a common variety, a comparison must be made with other deposits shown to be common varieties, and that the deposit need only have some property giving it distinct and special value in order to be classified as an uncommon variety.

It is the burden of the United States to establish prima facie the invalidity of Petitioner's placer claims. Rodgers v. Watt, 726 F.2d 1376, 1380 (9th Cir. 1984); United States v. Zweifel, 508 F.2d 1150, 1157, cert. denied, 423 U.S. 829 (1975); Humboldt Placer Mining Company v. Secretary of Interior, 549 F.2d 622 (9th Cir. 1977). In interpreting § 611 the Interior Board of Land Appeals has said that:

> It is a prerequisite for an adequate comparison that the stone in question be compared with deposits of common varieties in order to determine if it has a distinct and special value reflected by a higher market value. See United States v. Pope, 25 IBLA 199 (1976). The mere fact that the materials are used for the same purposes is not sufficient. The test must be applied to the stone in question versus known common varieties. If the stones for comparison are uncommon varieties, each exhibiting a distinct and special value, it would be virtually impossible for a stone to meet the test unless its characteristics were such as to command the highest market value. The Government failed to establish that the stones used for comparison purposes were, in fact, common varieties.

U.S. v. Mamie Vaughn, et al., 56 IBLA 247, 252 (1981). In Vaughn the IBLA held that the government had failed to establish that the stone used for comparison purposes was, in fact, a common variety. Id. at 252. The Vaughn case is very similar to Petitioner's case where the government's comparison here was between the Dunbar schist and schist sold by Apache Stone Company. There is nothing in the record to indicate that the Apache Stone schist that was used for comparison was a common variety. Indeed the Ninth Circuit, the District Court and IBLA have all failed to even comment on this aspect of the government's case.

The comparisons undertaken in the proceedings below were between two types of schist used for building stone, both of which have properties giving them distinct and special value which was reflected in the fact that both were obtained from deposits that are

commercially valuable independent of their distance from the market. The record below shows that the Apache stone and Dunbar stone both sold for approximately $55.00 per ton. At that same time the average value for all stone sold in Arizona was $4.24 a ton (page 10a).

The Ninth Circuit failed to correctly apply the decisions of the IBLA and accepted the comparison with the Apache Stone without any allegation or proof that the Apache stone was itself, in fact, a common variety, despite evidence at the administrative hearing that showed that the Apache stone was, in fact, an uncommon variety.

If the decision below is allowed to stand, the Department of Interior will use this erroneous decision that building stone valued at $55.00 per ton in 1979 is a common variety as a base line for further comparison of special and distinct value. The result

will be that only a single truly unique deposit will be able to successfully meet the test of an uncommon variety. Unless this Court reviews the standards for determination of common variety status and sets forth reasonable criteria requiring comparison between the deposit at issue and other deposits demonstrated to be common varieties there will be virtually no possibility of demonstrating uncommon variety status, and 30 U.S.C. § 161 will have been effectively repealed.

III. The Ninth Circuit Improperly Rejected Consideration Of Technical And Economic Data Presented By Petitioner For Which Judicial Notice May Be Taken By The Appeals Court.

The Court of Appeals has also ruled that certain scientific and economic information concerning schist and building stone in Arizona found in government publications and standard reference works was improperly before them, citing ASARCO, Inc. v. EPA, 616 F.2d

1153 (9th Cir. 1980). Memorandum 84-1915 at 4 (page 6a). Despite the fact that the Court held that consideration of these items did not affect the Appeals Court's decision, Petitioner believes these items were wrongfully excluded from consideration.

The Ninth Circuit itself has held that:

> [I]t is both unrealistic and unwise to "straightjacket" the reviewing court with the administrative record. It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters.
>
> We think these conflicting considerations can be satisfactorily reconciled. If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency actions only for background

> information, as in Bunker Hill, or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision.

ASARCO, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). In this case Dunbar offered a scientific definition of the term "schist," a description of the formation known as the Yavapai Schist (in which the Dunbar schist is found) and the average value per ton of all stone sold in Arizona during 1981 for building and industrial purposes. All of this information provided background on the issue of the properties and value of schist in Arizona with respect to the common variety classification under 30 U.S.C. § 611.

Consideration of the information offered by Dunbar is expressly approved by the federal rules of evidence that provide that a court may take judicial notice of adjudicative facts at any stage of the proceeding, Fed. Rules of

Evidence Rule 201(a) and (f), including at the appeal stage. See note to Subd. (f), Rule 201, Notes of Advisory Committee on Proposed Rules. Where adequate information is available for the taking of judicial notice of an adjudicative fact, the appellate court is entitled to use such information. United States v. Gonzales, 442 F.2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 845.

Information of a similar type to that objected to by the Appeals Court here has been the subject of judicial notice in a number of cases, in Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979), the court held that judicial notice might be taken of federal registry relating to hospital rates and charges concerning medical care furnished by the United States and the holding in ASG Industries, Inc. v. United States, CD 4782, 467 F. Supp. 1187, 3 (Cust. Ct. 1979),

reversed on other grounds, 610 F.2d 770, that held that official publications such as import and export statistics of the United States Department of Commerce, Bureau of the Census, were properly the subject of judicial notice.

Dunbar's submission of citations from the Glossary of Geology and Related Sciences and the treatise and USGS Professional Paper No. 308 concerning the nature and definition of the term "schist," as well as the Arizona Bureau of Mines Yavapai County Geologic Map, showing the extent of the schist deposits on which the Government's Exhibit G28 was based are also proper subjects of judicial notice under, not only the cases cited above with respect to government publications, but also, cases allowing judicial notice to be taken of standard reference works, Owens-Illinois Glass Company v. American Coastal Lines, Inc., 222 F. Supp. 923 (S.D.N.Y. 1963), and holding that judicial notice may be taken of standard

chemical dictionaries. Azoplate Corp. v. Silverlith, Inc., 367 F. Supp. 711, affirmed, 506 F.2d 1050 (D. Del. 1974), cert. denied, 421 U.S. 914 (1975).

CONCLUSION

Based upon the above, Petitioners request that the Court grant the Petition for Writ of Certiorari seeking review of the Ninth Circuit Court of Appeals decision in this case.

Respectfully submitted this 24th day of April, 1985.

DeCONCINI McDONALD BRAMMER
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CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and employed in the County of Pima, State of Arizona, in the offices of DeConcini McDonald Brammer Yetwin & Lacy, P.C., and am a member of the bar of this Court. My business address is 240 North Stone Avenue, Tucson, Arizona 85701. On April 24, 1985, I served the following:

PETITION FOR WRIT OF CERTIORARI

by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mailbox at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Rex E. Lee, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

Jacques R. Gelin, Esq.
Attorney, Appellate Section
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530

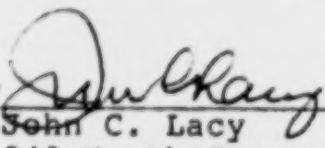
Attorneys for Respondents

and by placing the original and 40 copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mailbox at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Alexander Stevas
Clerk of the United States
Supreme Court
One First Street, NE
Washington, D.C. 20543

Executed on April 24, 1985, at Tucson, Arizona. I certify under penalty of perjury that the foregoing is true and correct.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By 
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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DUNBAR STONE COMPANY, RON DUNBAR, AND GERALD DUNBAR,	)	C.A. No. 84-1915
	)	D.C. No. CV 81-1271 PHX-EHC
Plaintiffs-Appellants,	)	
vs.	)	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, DEPARTMENT OF AGRICULTURE, FOREST SERVICE, and DISTRICT RANGER JOHN W. HOLT, Bradshaw Mountain District,	)	MEMORANDUM*
Defendants-Appellees.	)	

Argued and Submitted--December 10, 1984

Appeal from the United States
District Court for the District of Arizona
The Honorable Earl H. Carroll, District Judge,
Presiding

Before: CANBY, NORRIS and BEEZER, Circuit Judges.

Dunbar Stone Company, Inc., Ronald Dunbar, and Gerald Dunbar (collectively "Dunbar Stone") brought this action against the United States of America and several federal agencies and officers (collectively "the United States"), seeking judicial review of a decision by the Interior Board of Land Appeals ("IBLA"), that declared twenty-six unpatented mining claims to be void. The district court granted the United States' motion for a summary judgment, from which Dunbar Stone appeals. We affirm.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c)

I

FACT AND PROCEEDINGS BELOW

In 1976, Dunbar Stone took title to twenty-six unpatented mining claims in a national forest in Yavapai County, Arizona. Between 1976 and 1978, Dunbar Stone produced a variety of schist ("Dunbar schist") on thirteen of the claims, which are the subject of this litigation.

In 1978, the Bureau of Land Management initiated administrative proceedings to contest the validity of the mining claims. The government took the position that Dunbar schist is a common variety of stone and thus not subject to appropriation. On June 24, 1980, the administrative law judge invalidated all of Dunbar Stone's mining claims. The IBLA affirmed the decision of the administrative law judge on July 10, 1981.

Subsequently, Dunbar Stone brought an action for a declaratory judgment in the

district court. The United States counterclaimed for damages and injunctive relief. On March 9, 1983, the district court granted a partial summary judgment on the declaratory judgment claim in favor of the United States. The parties subsequently settled the counterclaim. The district court entered a final judgment on February 27, 1984.

II

ANALYSIS

A. Statutory Background

The statute governing mining on public lands states: "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase . . . ." 30 U.S.C. § 22. Section 611, which is the provision at issue in this case, states that "[n]o deposit of common varieties of . . . stone . . . shall be deemed a valuable mineral deposit within the meaning of the

mining laws of the United States so as to give effective validity to any mining claim . . . ." Id. § 611. Section 611 also states that the term "common varieties" does not refer to "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." Id. To implement section 611, the Department of the Interior issued a regulation that defined "common varieties" as including "deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits." 43 C.F.R. § 3711.1(b).

This court has recognized five guidelines for determining whether a mineral deposit is a common variety:

> (1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2)

> the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

McClarty v. Secretary of Interior, 408 F.2d 907, 908 (9th Cir. 1969).

III. Evidence Before the IBLA

Judicial review of a factual finding by the IBLA is limited to determining whether the finding is supported by substantial evidence.[1/] Dredge Corp. v. Conn, 733 F.2d 704, 707 (9th Cir. 1984).

[1/]Dunbar Stone relies on several items of evidence that were not before the IBLA. Accordingly, these items are not properly before us. ASARCO, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). As noted below, however, the consideration of those items does not effect the outcome of this appeal.

The IBLA found that the Dunbar schist had no "unique property" that would render it an uncommon variety of stone. The IBLA based this finding on the existence of vast quantities of comparable schist and the absence of special economic value for Dunbar schist. These facts are amply supported by the record.

The IBLA found that vast quantities of schist exist in Arizona. Donald J. Alexander, a mining engineer, testified that forty billion tons of schist cound be found in Yavapai County alone. Although Dunbar Stone challenges Alexander's methodology, his testimony is sufficient under the "substantial evidence" standard. The IBLA and the administrative law judge were aware of the challenges to Alexander's methodology, yet chose to accept his conclusions. Accordingly, we uphold the IBLA's finding.

Alexander's testimony also established the absence of a premium price or reduced production costs for Dunbar schist. Alexander described his conversations with Gerald Dunbar and Gerhard Seebold, who was Dunbar Stone's predecessor in interest, as follows:

> Q. What was the next question?
>
> A. I asked them what price premium did the unique properties of their schist command over other schists. Mr. Seebold replied that it was none, it was all the same price. Mr. Dunbar's reply was the same thing, one price.
>
> Q. What was the next question?
>
> A. I asked them if they had had unusually low overhead costs for production compared to other schist mining operations. Their answers to this was each no.
>
> Q. What was the next question?
>
> A. I asked if they got a better price resulting from any unique properties in their schist. Again, both answers were no.

Accordingly, the IBLA's finding that Dunbar schist lacks special economic value is supported by substantial evidence.

Dunbar Stone raises three arguments against the IBLA's findings. First, it argues that Dunbar schist has unique qualities, such as distinctive coloration and unusual hardness, that render it an uncommon variety of stone. The record reveals, however, that these qualities do not produce an economic advantage. The IBLA was correct when it refused to consider these qualities in the absence of an economic advantage. See McClarty, 408 F.2d at 909 (noting that a special value must be shown even when a unique quality is present); cf. United States v. Coleman, 390 U.S. 599, 603-04 (1968) (finding that the existence of immense quantities of indentical stone rendered the disputed deposit a "common variety").

Second, Dunbar Stone argues that Dunbar Schist's unique qualities expand the available market for its sale and thus create an economic advantage. The record, however, does

not reveal that Dunbar schist commands a premium price in any market. Accordingly, this argument is entitled to no weight.

Finally, Dunbar Stone notes that it sells Dunbar schist for $55.00 per ton, which is greater than the average price of $4.24 per ton for all other stone sold in Arizona. The record reveals, however, that a nearby mining company also produces schist for $55.00 per ton. In addition, the $4.24 figure includes crushed stone, which sells for an average price of $3.58 per ton. At least some types of building stone sell at a much higher price than Dunbar schist. As a result, Dunbar Stone's data proves nothing.

In sum, the IBLA's conclusion that Dunbar schist is a common variety of stone is amply supported by the record. While Dunbar schist has some unique characteristics, those characteristics are not sufficient to render Dunbar schist an uncommon variety of stone.

III

CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

DUNBAR STONE CO., et al.,	)	
Plaintiffs,	)	CIV-81-1271-PCT-EHC
v.	)	JUDGMENT
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

This action came on for hearing before the Court, Honorable Earl H. Carroll, District Judge, presiding, and partial summary judgment having been granted on March 9, 1983, and the remaining issues having been disposed of by Stipulation for Compromise Settlement and Stipulation of Dismissal of Counterclaim, filed February 22, 1984.

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing and that the action be

dismissed on the merits, each party to bear its own costs of action.

DATED this 27 day of February, 1984.

s/ Earl H. Carroll
UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX C

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

UNITED STATES
V.
DUNBAR STONE CO.

IBLA 80-780 Decided July 10, 1981

Appeal from decision of Administrative Law Judge Michael L. Morehouse declaring the New Strike Nos. 1 through 7 placer mining claims, the New Strike Nos. 1 through 7 lode claims, the Evergreen Nos. 1 through 6 lode mining claims, and the Evergreen Nos. 1 through 6 placer mining claims invalid. AZ 10637.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Effect of

   A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

2. Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property

Where deposit of Yavapai schist has pleasant coloration and allegedly can be blasted out and broken in such a manner as to tend to maintain unfeathered edges, it is nevertheless a common variety of building stone and is, therefore, unlocatable, as these characteristics are not unique properties setting it apart from vast amounts of other common stone found throughout the area where the deposit is situated.

3. Mining Claims: Contests

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of evidence that a discovery has been made and is present within the limits of the claim.

4. Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a mining claim and found the mineral values insufficient to support a finding of discovery, a prima facie case has been established, and if not rebutted, the mining claim is properly declared invalid.

5. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Administrative Review--

Administrative Procedure:
Substantial Evidence
--Appeals--Evidence:
Generally--Rules of Practice:
Appeals: Generally

On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. The powers of an agency reviewing an initial or recommended decision of an Administrative Law Judge are greater than those of an appellate court reviewing the decision of a trial judge.

APPEARANCES: William B. Fortner, Esq., Prescott, Arizona, for the appellant; T. Adrian Pedron, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On February 28, 1978, the Arizona State Director, Bureau of Land Management (BLM), acting on behalf of the Forest Service (FS), U.S. Department of Agriculture, initiated a complaint contesting the validity of 26 mining claims: the New Strike Nos. 1 through 7 lode claims, New Strike Nos. 1 through 7 placer claims, Evergreen Nos. 1 through 6 lode claims, and Evergreen Nos. 1 through 6 placer claims. Dunbar Stone Company (Dunbar) and G. H. Seebold were named as owners of the claims and contestees in the proceeding. The complaint alleged that no valid discovery existed on these claims, and that the lands embraced within their limits are nonmineral in character. The complaint also specifically alleged that a deposit of stone found within

the limits of the placer claims is not a valuable mineral deposit under section 3 of the Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. § 611 (1976), the so-called "Common Varieties Act."

Dunbar filed a timely answer generally denying these allegations and advised BLM that it had purchased Seebold's interests in the claims. Subsequently, BLM referred the matter to the Hearings Division of the Office of Hearings and Appeals for appointment of an Administrative Law Judge for a hearing, which took place on June 6 and 7, 1979, in Phoenix, Arizona.

On June 24, 1980, Administrative Law Judge Michael L. Morehouse issued his decision declaring these claims invalid, from which decision Dunbar (appellant) has appealed.

[1] The New Strike and Evergreen placer claims were all located on September 28, 1976. On this date, a portion of the lands on which the New Strike Nos. 3, 6, and 7 claims are situated was withdrawn from mineral entry by Public Land Order (PLO) No. 2303 (Govt Exhs. 3 and 4; Tr. 8-14). Mining claims located on lands which are withdrawn from mineral entry at the time of location are null and void ab initio. Accordingly, those portions of these three claims lying within the E 1/2 NW 1/4 and the E 1/2 sec. 17, T. 13 N., R. 1 W., Gila and Salt River meridian, are null and void. 1/

1/ As we have concluded that there was no discovery of "a valuable mineral deposit" on these placer claims, it is unnecessary to consider either whether the irregularity of their configuration or acreage (see 43 CFR 3842.1-5(d), or whether the effect of the failure to conform the New Strike Nos. 1 through 7 placer claims to the rectangular survey system as required by 43 CFR 3842.1-2(b) affect their validity.

[2] The only mineral deposit supporting the validity of the balance of the placer claims situated outside the withdrawn area is Yavapai schist, a stone which appellant has sold for building purposes for use as stone facing on buildings. Schist was first removed from these claims in 1967 or 1968 under a special use permit which expired in 1976, after which the claims in question were located.

There is little doubt that the mineral deposit satisfies the marketability test, which is the sine qua non to the validity of any mining claim, as appellant has presented documentation showing considerable sales of schist from these claims. However, maintaining a profitable mining operation does not by itself establish a valid claim where the material being mined was not locatable when claimed because it is a "common variety."

Until July 23, 1955, valid mining claims could be located and maintained for lands chiefly valuable for building stone, under the terms of the Mining Law of 1872 and the Act of August 4, 1892. However, in the Act of July 23, 1955, Congress excluded, inter alia, "common varieties" of stone from location. The Supreme Court, in United States v. Coleman, 390 U.S. 599 (1968), held that this last Act also excluded common varieties of building stone from location.

The Act of July 23, 1955, provides that a deposit having a property giving it a distinct and special value is not a common variety. Thus, in order to be valid, any mining claim for building stone located after July 23, 1955, must contain a deposit of building stone which has a property giving it distinct and special value, i.e., a deposit of an "uncommon variety." This requirement is in addition to

the requirement that the deposit be "valuable" under the marketability test. 43 CFR 3842.2(b).

In McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1969), the Ninth Circuit considered the standards [by] which [to] distinguish [between] common varieties from [and] uncommon varieties of building stone, as follows:

> (1) [T]here must be a comparison of the mineral deposit in question with other deposits of such mineral generally; (2) [to be an uncommon variety,] the mineral deposit in question must have an unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

Id. at 908.

Thus, the first step in determining whether the Yavapai schist is an uncommon variety (and therefore locatable) is to determine whether it has a "unique property." Appellant's witnesses stressed the pleasant earth tone coloration of the schist, and its ability to be blasted out and broken in such a manner as to tend to maintain sharp unfeathered edges. Both of these traits, they testified, were unusual and set the material apart from other types of schist from the area. Testimony by Gerhardt Seebold, who located the subject stone placers and operated the quarries for 15 years, set the volume of

this stone within the claims at 60,000 tons (Tr. 160, 241).

Appellant's witnesses testified that Apache Stone and Supply, Inc. (Apache), sells schist, and that this schist is available in earth tones but that its product was not as beautifully colored as that found on appellant's claims. Attractive coloration, even if unusual, does not distinguish a deposit of stone from other deposits of the same stone so as to justify the conclusion that the deposit has a distinct and special property, where comparable stone is abundant and is found with varied coloration. United States v. Mansfield, 35 IBLA 95 (1978); United States v. Brubaker, 9 IBLA 281, 80 I.D. 261 (1973), aff'd Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974); United States v. Shannon, 70 I.D. 136 (1963); United States v. Ligier, A-29011 (Oct. 8, 1962). This is because beauty of coloration is inherently subjective. One type of coloration from among the infinite variety of nature may appeal to some persons, and this coloration may in fact be unusual. However, the fact that one deposit of a material may bear this coloration does not make it unique, as there are often deposits which will do the same job to the full satisfaction of the other persons. Appellant makes no price distinction based on the various colors (Tr. 314).

The record shows that there is a vast amount of Yavapai schist of varying coloration throughout the area where appellant's claims are situated, and that Apache is selling comparable material, even though its coloration may be different from that found on appellant's claims. Accordingly, we find that the color of appellant's schist is not a distinct and special property having special economic value.

Appellant makes a great point of the fact that most schist rock from other sources has a high percentage of tapered or "feathered" edges, which make it difficult or unsuitable for laying up in a wall, whereas the Dunbar schist yields a low percentage of feather-edged stone, and thus is much more desirable. But simply because this may be uncommonly good schist does not necessarily make it uncommonly good stone. There are many other types of common stone which are suitable for wall facing. Were we to hold that a dsposit of a particular kind of country rock is uncommon merely because, unlike much rock of the same kind, it rises to a standard of acceptance for masonry work, we would be obliged to hold that vast quantities of other common stones suitable for such purpose are locatable under the mining law, notwithstanding the prohibitions of the Act of July 23, 1955, in that regard. We are not obliged to consider how a particular deposit of a common stone type ranks when compared only with other deposits of the same generic type (i.e., limestone, sandstone, shale, granite, basalt, slate, etc.), and hold that a superior or unusual occurrence of that particular type is an uncommon variety, when its special characteristics only make it suitable to be used in the same manner as common varieties of other types. Appellant's argument and evidence centers on the desirability of this deposit of schist, "compared to other schist that you get," (contestee's appeal brief, p. 6), but in considering common building stone we are not limited to comparing schist only with other schist, limestone only with other limestone, granite only with other granite.

Schist is a common variety of stone, widespread and vastly abundant. Like many

other types of common stone, it is frequently used as a building stone. It is a widely-accepted truism that nature does not duplicate exactly, i.e., that there are no two identical snowflakes, fingerprints, trees, mountains, etc. Each product of nature may be expected to have some distinct feature or unique characteristic which will distinguish it from others of its kind, and perhaps either enhance its value or render it worthless. But where these qualities only serve to make a common stone suitable or desirable for a common purpose, such as construction, without imparting any marked, special, economic advantage over the broad range of other common building stones, that stone cannot be considered an exception to the statutory bar against the location of "common varieties" of stone imposed by 30 U.S.C. § 611 (1976).

As we observed in United States v. Guzman, 18 IBLA 109, 124, 81 I.D. 685, 692 (1974), a case in which we held that the natural sharp angularity of particles of sand did not make a deposit of the sand unique:

> Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare.

So it is here; the angularity of this schist, even if naturally occurring, is inadequate to make it uniquely valuable in an economic

sense. As Judge Morehouse found, the commonness of the schist found on appellant's claims is also reflected by the abundance of similar stone found near these claims, on lands outside their boundaries.

Much of the testimony for contestee at the hearing came from stone masons and masonry contractors who recited the advantages realized in laying schist from appellant's claims as opposed to schist from other sources because of the relatively squared (as opposed to feathered) edges. However, contestee failed to establish that this characteristic was reflected in either a higher market price when compared with similar materials or in a unique advantage in cost of production (quarrying) of the stone. McClarty v. Secretary of the Interior, supra. Comparison of price lists of contestee and Apache Stone, a competitor in the market for schist for building stone, shows the prices to be very similar (Exhibits G-29 and G-30).

This schist is readily distinguishable from "cliffstone" and "heatherstone," other types of building stone which we have recognized as unique in, respectively, United States v. Pope, 25 IBLA 199 (1976), and United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974). These stones were unique in that they could be removed for sale and use with practically no expense, simply by prying them out of formation with a bar, a distinct and special economic advantage. Appellant admits that the schist on his claim must be drilled and blasted out of the formation, and then split with a maul, or with a hammer and chisel, a time-consuming and expensive process associated with removal of common stone (Tr. 268).

Accordingly, we affirm Judge Morehouse's finding that the schist building stone found on the New Strike Nos. 1 through 7 and Evergreen Nos. 1 through 6 placer mining claims is not unique and is, therefore, a common variety of mineral. As such, it is not locatable under the mining laws, and these claims are therefore null and void.

[3,4] Turning to the New Strike Nos. 1 through 7 and Evergreen Nos. 1 through 6 lode mining claims, we have thoroughly reviewed the record of this case and have concluded that Judge Morehouse's findings are correct. Accordingly, we adopt his decision that these claims are invalid as our own.

The affidavit of William B. Fortner, filed with appellant's statement of reasons, concerning samples taken from the claims is not cognizable, as it is evidence which should have been presented at the hearing in this matter. We decline to grant it any weight, as it has not been subject to cross-examination. While such a submission bears on whether to reopen the record for further presentation of evidence, we will not do so here in view of the strong indications in the record that these claims have been largely mined out and that the expense of processing ore from them is high.

[5] Finally, although we here affirm the findings of fact made below, we note that FS, in its answer, asserts that "[t]he question of whether Judge Morehouse's fact finding should be reversed is determined by reference to the substantial evidence rule." This is incorrect. The Board of Land Appeals, as the delegate of the Secretary of the Interior, 43 CFR 4.1, has the authority to make decisions concerning the public lands as fully and finally as might the Secretary himself.

This authority includes the power to make a de novo review of the entire administrative record and to make findings of fact based thereon. While we recognize the propriety of deferring to the Administrative Law Judge's findings where a witness' demeanor affects his credibility, our authority to make findings of fact which may differ from the former's is not limited by the substantial evidence rule in the manner stated. "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision * * *" 5 U.S.C. § 557 (1976). "The powers of an agency reviewing an initial or recommended decision of an examiner [now Administrative Law Judge] are greater than those of an appellate court reviewing the decision of a trial judge." N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899 (2nd Cir. 1963).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

s/ Edward W. Stuebing
Edward W. Stuebing
Adminstrative Judge

We concur:

s/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

s/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Adminstrative Judge

APPENDIX D

APPENDIX D

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

June 24, 1980

UNITED STATES OF AMERICA	:	ARIZONA 10637
	:	
Contestant	:	Involving the New Strike Nos. 1 thru 7 lode mining claims, New Strike Nos. 1
v.	:	thru 7 placer mining claims, Evergreen
DUNBAR STONE CO., ROBERT DUNBAR, Pres.,	:	Nos. 1 thru 6 lode mining claims, and Evergreen Nos. 1 thru 6 placer mining
Contestees	:	claims situated in Sections 17, 18, 19 and 20, T. 13 N., R. 1 W., GSR Mer., Yavapai County, Arizona

DECISION

Appearances: T. Adrian Pedron, Esq., Office of the General Counsel, Department of Agriculture, for contestant;

William Benjamin Fortner, Esq., Prescott, Arizona, for contestee.

Before: Administrative Law Judge Morehouse.

This is a proceeding involving the validity of mining claims located under the General Minings laws of 1872, as amended, 30 U.S.C. § 22, et seq., and 30 U.S.C. § 161, which authorizes the entry of lands under the mining laws that are chiefly valuable for building stone.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint charging that the subject mining claims are invalid because:

> a. A valid discovery as required by the mining laws of the United States does not exist within the limits of any of the New Strike No's 1 through 7 lode mining claims, the New Strike No's 1 through 7 placer mining claims, the Evergreen No's 1 through 6 lode mining claims, and the Evergreen No's 1 through 6 placer mining claims.
>
> b. The deposit of stone found within the limits of the claims is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601).
>
> c. The land embraced within the limits of the claims is non-mineral in character within the meaning of the mining laws.

Contestees filed a timely answer denying the material allegations of the complaint and a hearing was held on June 6 and 7, 1979, at Phoenix, Arizona. Briefs have been filed by the parties, the last having been received on December 26, 1979.

The New Strike and Evergreen lode claims were located many years ago and were acquired by one Frank Melluzzo and G. H. Seebold, who have since sold their interests to Dunbar Stone Co., the present owner. The New Strike and Evergreen placer claims directly overlie the lode claims and were located by G. H. Seebold in 1975 or 1976. Dunbar Stone Co. is also the present owner of these claims. Certain portions of the New Strike 3, 6, and 7 were withdrawn from mineral entry on March 17, 1961 (see area marked in red on Exs. G-3 and G-4). To the extent that new Strike 3, 6, and 7 placer claims encroach on said withdrawn land, they are invalid since they were located subsequent to the withdrawal date. The lode and placer claims will be considered separately.

LODE CLAIMS

Mr. Donald Alexander, a mining engineer employed by the Forest Service, testified that he has been familiar with the claims for a number of years. They are located on the northern flank of the Bradshaw Mountains in rather mountainous terrain. The rock formation on the claims is made up entirely of yavapai schist of Precambrian age. He conducted a mineral examination of the claims on November 22, 1976, accompanied by Mr. Seebold and Mr. Robert Dunbar. He stated that he walked over the whole area and asked Mr. Seebold and Mr. Dunbar to show him the discoveries that they had on each claim. He found no discoveries on the claims other than

on New Strike No. 1 where he was directed by Mr. Seebold. There is an adit on New Strike No. 1 and he took three samples from this adit at places pointed out by Mr. Seebold. In addition, he took two surface samples (see generally, Ex. G-6 for a diagram of the area and the sites sampled). In addition, he took a sample (No. 2848) from a pit on New Strike No. 1 and one sample (No. 2854) from a pit on Evergreen No. 2. These samples were assayed (Ex. G-11) and the only assay that showed good values was No. 2851 which came from a vein approximately 1 1/2 to 2 feet in width. It was his opinion that this was an area of old mining in the adit and the good values had been largely mined out. He did not feel that there was a sufficient quantity of high grade ore to mine profitably particularly considering the narrow width of the vein. He saw no surface mineralization on any of the other claims that he felt was worth sampling and none were pointed out to him by Mr. Seebold or Mr. Dunbar. It was his opinion that there was no reasonable prospect of paying mine on these claims because the only valuable vein mineralizatoin was on New Strike No. 1 in the adit and most of that had been mined out. In reaching this opinion, he stated that he was aware that ore has previously been shipped to the Iron King Smelter but this was discontinued which indicated to him that mining had been operated at a loss. In addition, the Iron King Smelter had closed down and according to his investigations the only smelter that would take lead and zinc ore is located in Bartlesville, Oklahoma. Shipping costs to such a destination even if there were sufficient ore would be prohibitive.

Mr. Gerhardt Seebold, previous owner of the claims, testified that he has been a miner for approximately 35 years. He purchased the lode

claims with Frank Melluzzo in 1956 and has been quarrying rock off the claims since that time. He has taken a number of samples from the New Strike No. 1 lode claim. Sample Nos. 6263, 6264, 6265, and 6266 (for assay results see Ex. R-2), were taken from the adit as indicated on Ex. R-6. A further sample was taken from the winz off the botton drift (for assay result see Ex. R-7), and two samples were taken from the dump outside the adit (for assay reports see Ex. R-3 and R-5). It is his opinion that the mine on New Strike No. 1 is primarily a lead and zinc mine, not a gold mine although there are some good gold values present. He has no real idea as to the reserves present. During the late 60's, he leased the New Strike No. 1 to a friend of his, one Carl Schumack, who shipped ore to the Iron King Smelter at Humboldt, Arizona. Schumack closed the mine down when the Iron King Smelter closed down. It is his belief that if the Iron King starts up again, then the New Strike no. 1 can start up again.

Mr. Gerald Dunbar, president of the Dunbar Stone Co., present owner of the claims, testified that the claims were purchased because of the building stone and he did not intend to open up the shaft on New Strike No. 1 and operate a lode mine.

The government established a prima facie case of invalidity through Mr. Alexander's testimony. As previously noted, the ultimate burden is on contestees to show by a preponderance of the evidence that the claims are valid. This they have failed to do. it is realized that one of the government samples (No. 2851, see Ex. G-11) shows high values for zinc and lead and good values for gold, silver and copper. Also, some of the contestees' assays (all taken from New Strike No. 1) show good values. However, there is absolutely no

evidence from which any conclusion can be drawn as to the amount of mineralization that might be available for extraction nor is there any evidence concerning costs of extraction and marketing if, in fact, sufficient quantity exists. When the New Strike No. 1 was leased during the late 1960's, the lessee shipped approximately 128 tons of ore to the Iron King Smelter in October, November and December of 1967. After smelter deductions, royalties and expenses, the lessee received less than $2.00 a ton for the material shipped (see Exs. R-11, R-12, R-13, and R-14). This would hardly be enough to cover mining costs and it is easy to understand why the lessee discontinued mining. No mineralization of any value has been discovered on any of the other claims.

Accordingly, New Strike Nos. 1 through 7 and Evergreen Nos. 1 thru 6 lode mining claims are declared invalid.

PLACER CLAIMS

These claims were located subsequent to the Act of July 23, 1955, 30 U.S.C. § 611, which withdrew common varieties of stone and other designated materials from location under the mining laws. This Act provides that the term common varieties "does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." In United States v. Coleman, 390 U.S. 599 (1968), the court construed the 1955 Act as removing from the coverage of the mining laws common varieties of building stone, but leaving the 1892 Act (30 U.S.C. § 161) effective as to building stone that has some property giving it distinct and special value. In other words, stone which is valuable as building stone is not, by reason of that fact alone, an uncommon variety of stone.

The tests that are applied in determining whether a deposit of stone or other designated material is a common or uncommon variety are (1) does the material have some unique property which gives it value for purposes for which other deposits of similar materials are not suited; or (2) if the material is used for the same purposes as other similar materials, does it possess some unique property which gives it a distinct and special value for such uses which is reflected by (a) a higher market price in comparison with other similar materials, or (b) reduced costs of overhead so that the profit to the producer is substantially more even though the market price is competitive with other similar materials. Boyle v. Morton, 519 F.2d 551 (9th Cir. 1975); Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974); McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969); United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974); United States v. McCormick, 27 IBLA 65 (1976).

In addition to satisfying the uncommon variety test, a claim located for stone or other designated material must also meet the basic requirements of the mining laws. One of these is the actual discovery of a valuable mineral deposit, i.e., the finding of a deposit that can be extracted and marketed at a sufficient profit to justify a person of ordinary prudence in spending his labor and means in working the claim. United States v. Coleman, supra; Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Kincannon, 13 IBLA 165 (1973).

There does not appear to be any question that the stone on these claims can be extracted and marketed at a profit. Mr. Seebold testified that he has quarried rock off the claims since

approximately 1956 until the sale of the claims to Mr. Dunbar, and Mr. Dunbar introduced an exhibit (Ex. R-15) showing the sale of some 4,279 tons of rock to various customers over a period of two and a half years. Thus, the only issue is whether the building stone on these claims has some unique property which gives it value for purposes for which other deposits of similar materials are not suited or if other similar materials are used for the same purpose, does that stone on these claims have some unique property which gives it a distinct and special value for such use.

Mr. Alexander testified that when he examined the claims on October 20, 1977, he had a conversation with Mr. Seebold and Mr. Dunbar in which he inquired as to the unique properties of this particular schist building stone. Their reply was that the stone had square edges and a flat bedding plane in addition to a variety of colors. Mr. Alexander inquired further as to whether these properties gave the stone a price premium over other schists and whether quarrying costs were less due to these properties. The answer he received was that building stone on the claims did not command a premium price over other schists and that quarrying costs were the same as other schists. Mr. Alexander testified further that this type of schist building stone is of widespread occurrence in Yavapai and Maricopa Counties in Arizona (see Ex. G-28). He has compared the stone on the Dunbar claims with stone from other pits and outcroppings in the area and in his opinion there is not real difference in the Dunbar schist and this other schist. He acknowledged that there is always some difference in color, hardness, and the fracture lines in each particular deposit and this would vary from

deposit to deposit, but that basically all the stone is schist and very similar.

Mr. Vince Lardner who is in the stone business and is also a masonry contractor in Albuquerque, New Mexico, testified that he buys one type of schist from Dunbar which is quite popular with his customers. The schist has good color and has square flat edges rather than feathered edges and making it much easier to lay than stone with feathered edges and thus it is more popular with stone masons. He has his own quarry approximately 60 miles south of Albuquerque, however, he does not have the brown or green type in this quarry and thus purchases these colors from Dunbar.

Mr. Gary Handley, a masonry contractor in Prescott, Arizona, testified that he uses 20 to 30 tons of Dunbar Stone a month and uses only Dunbar stone. He prefers the Dunbar stone because it has square edges, has good color and is easier to lay. He does not like the schist quarried at Meyer, Arizona, because it tends to have feathered edges. He stated he would be willing to pay more for Dunbar stone.

Mr. Gerald Paterman, another masonry contractor in Prescott, testified that the Dunbar schist is a good hard schist that has deep color and square edges.

Mr. Seebold testified that rock has been quarried off these claims since before 1955. He feels the stone on the claims is unique because it is hard and has square edges and in addition there are a number of different colors on the claims. Another factor is that the stone splits easily. Another unique factor is that according to his estimate, there are approximately 60 million tons of this stone on the claims.

Mr. Gerald Dunbar testified that he is the President of Dunbar Stone Co. and has been mining from these claims for the last 10 or 12 years and finally purchased them for a total of $33,000.00 three of four years ago. He purchased the claims for the building stone. He firmly believe that the schist on these claims is unique because you get a higher percentage of square edges than in other schist deposits. Also, the colors are deep and varied. He ships all over the western United States and sales have been increasing every year. He remembers having a conversation with Mr. Alexander, but denies telling Mr. Alexander that the stone on the claims was not unique. Mr. Dunbar acknowledged, however, that the outcroppings of the schist on the claims in question extend beyond the borders of the claims. In fact, he owned some claims near the New Strike and Evergreen claims and stated:

> JUDGE MOREHOUSE: Do any of these outcroppings extend beyond the borders of your claims?
>
> THE WITNESS: Yes, beyond the Evergreens some of the outcroppings extend into another gulch and we had some claims in Seven Mile Gulch.
>
> JUDGE MOREHOUSE: You have some claims there?
>
> THE WITNESS: Yes.
>
> JUDGE MOREHOUSE: Were these lode of placer claims?
>
> THE WITNESS: They were placer claims.

JUDGE MOREHOUSE: I see. Do you still have those claims?

THE WITNESS: I think they're just in limbo. We -- they haven't offered us to renew a Special Use Permit. They've never contacted us. When we were working those claims, Mr. Seebold got together with us and wanted us to do the wholesale work and the heavy work in his claims and so his claims seemed to be a little better than our claims. Some of the stone on ours looked like the veins as they crossed our claims and were getting softer grade and there wasn't as much there, so we sent ahead and made an agreement with Seebold and we quarried --

JUDGE MOREHOUSE: How many claims did you have over there?

THE WITNESS: I think there were -- I don't remember exactly, but I think there was [sic] probably eight (8). (Tr. 286, 287)

Having carefully considered the entire record, I conclude that contestees have failed to show by a preponderance of the evidence that the building stone on these claims possess a unique property giving it a value for purposes for which other deposits of similar materials are not suited. It is clear from the record that Apache Stone Company in Phoenix quarries schist from the Blue Bell Quarry (see Ex. G-28), which is within the same general vicinity as the subject claims. While it does not appear what percentage of the stone mined from the Blue Bell Quarry is square edged, the prices charged for the Apache stone are generally equivalent to the prices of the

Dunbar stone (see Exs. G-29 and G-30). It is obvious that the Dunbar and Apache stone are used for the same general building purposes. Accordingly, New Strike Nos. 1 through 7 and Evergreen Nos. 1 through 6 placer mining claims are declared invalid.

s/ Michael L. Morehouse
Michael L. Morehouse
Administrative Law Judge

APPEAL INFORMATION

The contestees, as the parties adversely affected by this decision, have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict complaince with the regualtions in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken the adverse party, the Forest Service, can be served by service upon its attorney at the address listed below.

Enclosure: Information Pertaining to Appeals Procedures

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No. 84-1680

In the Supreme Court of the United States

OCTOBER TERM, 1984

DUNBAR STONE COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Cases:	Page
Andrus v. *Shell Oil Co.*, 446 U.S. 657	2
Boyle v. *Morton*, 519 F.2d 551, cert. denied, 423 U.S. 1033	5
Brubaker v. *Morton*, 500 F.2d 200	5
McClarty v. *Secretary of the Interior*, 408 F.2d 907	3, 4
United States v. *Coleman*, 390 U.S. 599	2
Statutes and regulation:	
Act of July 23, 1955, § 3, 30 U.S.C. 611	2, 3
Act of May 10, 1872, 30 U.S.C. 22 *et seq.*	1
Materials Act of 1947, 30 U.S.C. 601 *et seq.*	2
43 C.F.R. 3711.1(b)	2

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The only question properly presented by the petition is whether the determination by the Secretary of the Interior that petitioners' schist did not qualify as an "uncommon variety" of building stone is supported by substantial evidence.

1. The general mining law (the Act of May 10, 1872, 30 U.S.C. 22 *et seq.*) invites citizens of the United States to locate and remove "all valuable mineral deposits in lands belonging to the United States * * *," and, upon satisfaction of minimal re-

quirements and a very modest payment, to obtain ownership of the land as well. See, *e.g.*, *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 658-659 n.1 (1980). But, by Section 3 of the Act of July 23, 1955 (Common Varieties Act), 30 U.S.C. 611, Congress withdrew common varieties of minerals from location under the mining law, declaring that "[n]o deposit of common varieties of * * * stone * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claims * * *." Instead, such minerals became subject to disposition under the Materials Act of 1947, 30 U.S.C. 601 *et seq.*, which provides for sale of mineral and vegetative materials on federal lands without affecting title to the land itself. The concern was that immense areas of the public domain would be appropriated without compensating benefit to the Nation if the mining laws continued to apply to common varieties of building stone and common types of sand and gravel. See *United States* v. *Coleman*, 390 U.S. 599, 603-605 (1968).

The question remains, of course, what is a "common variety." Section 3 of the 1955 Act provides that it shall not affect "deposits of [the listed] materials which are valuable because the deposit has some property giving it distinct and special value." To implement the proviso, the Department of the Interior issued a regulation that defined "[c]ommon varieties" as including "deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits." 43 C.F.R. 3711.1(b). A lead-

ing judicial decision has elaborated on this test by identifying five guidelines for determining whether a mineral deposit is a common variety:

> (1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

McClarty v. *Secretary of the Interior*, 408 F.2d 907, 908 (9th Cir. 1969).

2. The mining claims here involve land within Prescott National Forest in Arizona. Petitioners' predecessor located 13 lode claims many years ago; they were abandoned, have been declared invalid, and are no longer at issue. Directly overlying these lode claims are 13 placer claims, located in September of 1976. On February 28, 1978, the Bureau of Land Management of the Department of the Interior filed a contest proceeding charging that 13 lode claims were void for lack of a discovery and that the lands embraced within their limits were non-mineral in character. The complaint also alleged that the deposit of stone, a variety of schist called Yavapai schist, found within the limits of the 13 overlying placer claims were not a valuable mineral deposit within the meaning of Section 3 the Common Varieties Act. Pet. App. 27a.

On June 24, 1980, after a two-day hearing, an administrative law judge (ALJ) invalidated all of petitioners' mining claims. Pet. App. 26a-37a. On appeal, the Interior Board of Land Appeals (IBLA) affirmed the ALJ's decision that, although the Yavapai schist was marketable at a profit, it failed to meet the test of "unique property" outlined by the Ninth Circuit in the *McClarty* case and in the regulations for it to qualify as an "uncommon variety" (Pet. App. 14a-25a). The IBLA based this finding on the existence of vast quantities of comparable schist in the area and the absence of special economic value for petitioners' schist. Pet. App. 14a-25a. One witness had testified that 40 billion tons of schist could be found in Yavapai County and that another 16 billion tons could be found in neighboring Maricopa County. Another witness estimated the amount of stone within the claims at 60 million tons. Pet. App. 20a-24a.

While the IBLA noted that the record showed that petitioners' schist had a pleasant coloration and that it could be blasted out and broken in such a manner as to tend to maintain sharp, unfeathered edges, petitioners' witnesses failed to show that their schist could command a premium price in the market, or that it could be produced at a reduced cost, as the *McClarty* decision and the regulations require. Pet. App. 14a-22a.

3. Petitioners filed an action for a declaratory judgment in the district court challenging the IBLA's decision. The United States counterclaimed for damages and injunctive relief. On March 9, 1983, the district court granted a partial summary judgment on the declaratory judgment claim in favor of the United States (Pet. App. 12a-13a). The parties subsequently settled the counterclaim.

Petitioners appealed the holding that the 13 unpatented placer mining claims were invalid. (They did not challenge that part of the district court's decision holding that the 13 lode claims were invalid.) On January 24, 1985, the court of appeals, by an unreported memorandum, affirmed the district court's decision (Pet. App. 1a-11a). The court held that the IBLA's determinations that vast quantities of schist exist in Arizona, and that petitioners' schist lacks special economic value, were supported by substantial evidence. Pet. App. 8a. The court also held that IBLA was correct in refusing to consider the stone's unique qualities in the absence of an economic advantage. Pet. App. 9a. The court further held that since petitioners' stone did not command a premium price in any market their argument that their stone's unique qualities expanded the available market was entitled to no weight. Pet. App. 9a-12a. Finally, the court ruled that while the record showed that petitioners' schist sold for more than the average price of stone in Arizona, a neighboring company also produced schist at the same price and that at least some types of building stone sold at a much higher price than petitioners' schist. Pet. App. 10a.

4. The decision of the court of appeals is correct, and is supported by longstanding and consistent administrative and judicial construction of the relevant statutes.[1] It does not conflict either with the decisions of other circuits, or with any decision of this Court. Accordingly, further review is not warranted.

Petitioners assert (Pet. 13-19) that the Secretary and the courts applied the wrong test in determining

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[1] See, *e.g.*, *Brubaker* v. *Morton*, 500 F.2d 200 (9th Cir. 1974); *Boyle* v. *Morton*, 519 F.2d 551 (9th Cir.), cert. denied, 423 U.S. 1033 (1975).

whether they had satisfied their burden of showing that the schist on their claims was not a common variety of stone within the meaning of Section 3 of the 1955 Act. This contention is wholly without merit. The IBLA found that schist exists in vast quantities in Arizona, and that petitioners' schist had no "unique property" that would render it an uncommon variety of stone. The record showed that petitioners' schist did not command either a premium price or reduced production cost. Petitioners' attempt to fashion a test, whereby building stone need only have "some property" giving the deposit distinct and special value, is meaningless.

Petitioners' argument (Pet. 19-23) that IBLA and the courts below failed to demonstrate that petitioners' stone is a common variety presents no issue for this Court. The IBLA found "that Dunbar schist lacks special economic value," and the court of appeals held (Pet. App. 8a) that this finding was supported by substantial evidence. Finally, petitioners' complaint (Pet. 23-28) that the Ninth Circuit rejected consideration of technical or economical data which petitioners submitted for the first time on appeal in this case is incorrect. Although the court could have rejected the proffered evidence as untimely, the court did consider it and found that it did not avail petitioners. The court of appeals noted petitioners' attempt to compare their schist, which sells at $55.00 per ton, with all stone sold in Arizona, which sold at $4.24 per ton and which figure included crushed stone, which sells at $3.58 per ton. The court noted that the record showed that a nearby competitor also produces stone at about the same price as do petitioners. Pet. App. 10a. Petitioners' data also showed that the average price of building stone in

Arizona sold for $113.04 per ton, more than double the price of petitioners' stone. Accordingly, the court correctly concluded (*ibid.*) that petitioners' data proved nothing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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